UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

THOMAS MACLEOD,
Petitioner,

v.

DAVID NOLAN,
Respondent.

CIVIL ACTION
NO. 04-11629-PBS

PETITIONER'S MOTION FOR A CERTIFICATE OF APPEALABILITY

Now comes the above petitioner, Thomas MacLeod, ("MacLeod") and moves this Honorable Court to issue a Certificate of Appealabilty ("COA")(under 28 U.S.C. § 2253(c), For the following grounds:

PROCEDURAL BACKGROUND

Around June of 2004, MacLeod petitioned this Federal Court for the Great Writ. Protesting and challenging a clearly unreasonable application of Supreme Court precedent of a decision rendered by the Massachusetts Appeals Court. Commonwealth v. Thomas MacLeod, 61 Mass.app.Ct. 1105,, 808 N.E.2d 331, NO. 03-P-1125, 2004 WL 1077954 May 13, 2004. An application for leave to obtain further appealate review was denied by the Supreme Judicial Court without opinion. Commonwealth v. Thomas MacLeod, 442 Mass. 1104, 819 N.E.2d 1229 (2004).

The Magistrate assigned to this matter issued her (Dein, U.S.M.J.), decision on January 24, 2007. The Report and Recommedation to the District Court Judge, reckoned that the petition be "Denied".

MacLeod objected to the Report and Recommendation raising a crystal clear quibble over whether the trial court record disclosed a guilty plea that was both " intelligently and voluntarily " given. Boykin v. Alabama, 395 U.S. 238, 242-43, 89 S.Ct. 1709, 1711-12 (1969). Moreover, MacLeod displayed a "Waiver of Defendants Rights" form that unequivocally shows a memorialized waiver at an **earlier** plea hearing before another justice, other than the justice that ulitmately took MacLeod's (alleged) guilty plea. Contrary to the Report and Recommendation MacLeod illuminated the particular significance to the clear error of the state court's determination and incorrect assessment of the validity of the guilty plea. And, that the Report and Recommendation was not "entitled to the presumption of correctness." Parke v. Raley, 506 U.S. 20, 35, 113 S.Ct. 517, 526 (1992). The Appeals Court's reliance on Commonwealth v. Kopsala, 58 Mass.app. ct. 387,, 790 N.E.2d 1093 (2003), is further misplaced and a substantial showing of MacLeod's constitutional rights to a jury trial on the habitual portion of the unreasonable and contrary decision of the Appeals Court.

MacLeod adequately established a conflict and demonstrated that the memorialized waiver was **not** signed at the change of plea hearing before Associate Justice Donovan. But had been signed at an earlier aborted hearing before another Associate Justice, McDaniel. Its clear on the Waiver form, attached hereto, that " reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were ' adequate to proceed

encouragement to proceed further...'. Slack v. McDaniel, 529 U.S. 473, 483-84 (2000)(quoting Barefoot v. Estelle, 463 U.S. 880, 892-93 (1993).

Next, there is the statute in Gen. Laws ch 278,§11A, that bears the rubric, "Habitual criminals, seperate trial on issue of prior convictions". That **seperate trial** component requires in mandatory language, that MacLeod, **..shall be further inquired of for a plea of guilty or not guilty...** There was no further inquiry given to MacLeod. The Appeals Court decision is so unreasonable in its, "There is no merit to the strained content-ion that [this] collquy must advise a defendant redundantly that waiver of the right to a jury trial encompasses the entire indictment." In Boykin, it is required that the defendant be (redundantly)(advised) that the waiver of a jury trial be intelligently and voluntarily made. Chapter 278, mandates a seperate **"further inquiry"** before sentence is imposed. The reports tergiversation in regards, to MacLeod does not claim he would have proceeded differently if he had been seperately advised of his right to a jury trial. Is grossly misplaced, and somewhat like locking the barn door after the animals have exited. As, MacLeod has always contended that had he been advised at all to Chapter 278's requirements he would have proceeded more carefully and not waived his jury trial rights to the habitual portion of the indictment.

Lastly, the Report and Recommendation to the retroactivety of Apprendi, Blakely and Booker, to the judges mingling of the substantive indictments and the Fifth Amendments rights to a jury trial are not written in stone. And, certainly something

which reasonable jurists could debate, and quite possibly resolve in a different manner.

Therefor, with all due respect to this Court the Certificate of Appealability should issue and MacLeod allowed to appeal.

Respectfully Submitted,
By the petitioner,

July 18, 2007

Thomas MacLeod
1 Administration Rd.
Bridgewater,MA

Certificate Of Service

I, Thomas MacLeod, sent a copy of the above motion on Susan Reardon, AAG, 1 Ashburton Place Boston,MA postage prepaid.
Thomas macLeod